1980

Committeee of Consumer Services; Parowan Valley Pumpers association, Cedar Valley Pumpers association and Beryl Pumpers association; Enterprise Valley Pumpers , Inc. v. Public Service Commission of Utah; Milly 0. Bernard, Chairman; Kenneth Rigtrup, Commissioner; and Pavid R. Irvine, Commissioner : Brief of Respondent

Utah Supreme Court

Grant Macfarlane, Jr., Patrick Shea; Attorneys for CP National Corporation

IN THE SUPREME COURT OF

THE STATE OF UTAH

COMMITTEE OF CONSUMER SERVICES; PAROWAN VALLEY PUMPERS ASSOCIATION, CEDAR VALLEY PUMPERS ASSOCIATION and BERYL PUMPERS ASSOCIATION; ENTERPRISE VALLEY PUMPERS, INC.,	:	
Appellants,	:	CASE NO. 16891
vs.	:	
PUBLIC SERVICE COMMISSION OF UTAH; MILLY O. BERNARD, Chairman; KENNETH RIGTRUP, Commissioner; and DAVID R. IRVINE, Commissioner, and CP NATIONAL CORPORATION,	:	
Respondents.	:	

BRIEF OF RESPONDENT

C. P. NATIONAL CORPORATION

An Appeal of the Supplemental Report and Order of January 11, 1980 of the Public Service Commission.

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PUBLIC SERVICE COMMISSION OF UTAH; MILLY O. BERNARD, Chairman; KENNETH RIGTRUP, Commissioner; and DAVID R. IRVINE, Commissioner; and C. P. NATIONAL CORPORATION,	:	
Defendants.	:	

NATURE OF THE CASE

This is a second appeal in a rate case filed by CP National Corporation (formerly California-Pacific Utilities Company and herein "CPN"). In 1976 the Utah Public Service Commission ordered CPN to increase its rates to recover 53.03% of costs associated with a new transmission line constructed to serve its Utah electric customers. CPN and Parowan Pumpers Association et. al, each appealed. CPN contended that the Commission should have granted a rate increase to allow recovery

of 100% of its costs. Parowan Pumpers Association argued that no increase should have been allowed. The Court found inconsistencies in the Commission's order and remanded with instructions to conduct further hearings, if necessary, and to harmonize its findings and order.

DISPOSITION OF THE CASE BY THE PUBLIC SERVICE COMMISSION

After further hearings the Commission amended and supplemented the findings and conclusions of its earlier order leaving the ordering provisions undisturbed and denied a petition for customer refunds for the effective period of the order. The Committee of Consumer Services and certain customers appealed.

RELIEF SOUGHT ON APPEAL

Appellants seek an order directing the Commission to order a refund. CPN asked the Court to affirm the Commission's order.

STATEMENT OF FACTS

On February 8, 1977 the Utah Public Service Commission issued a "Final Report and Order" (hereinafter the "February 18, Order") on the application of CPN for authority to pass along to its electric customers in Iron and Washington Counties costs charged to CPN by Utah Power & Light Company for construction of an electric transmission line. The Commission allowed recovery of 53.03% of such costs and ordered a rate increase

accordingly. Neither the utility nor the protestants were satisfied and both petitioned the Commission for rehearing. Each petition was denied by the Commission. Each petitioner thereafter sought review by the Court. The February 18 Order of the Commission was reviewed by the Court. On October 5, 1978 the Court reversed and remanded to the Commission and instructed it to "take such action, including further hearings, if necessary, as it deems advisable for the purpose of achieving a harmonious relationship between its findings and order." Parowan Pumpers Association v. Public Service Commission 586 P.2d 407, 409.

After the Supreme Court's decision the Commission consolidated a related case then pending before it, and on February 9, 1978 conducted a prehearing conference on the consolidated cases. The conference resulted in a Pre-hearing Order and Notice of Hearing dated November 30, 1978. As related to the present appeal the Commission framed the issues as follows:

> "(a) Does the decision of the Utah Supreme Court in Case 76-023-04 and the remand pursuant to that decision require or allow modification of the Commission's Final Report and Order in that Case without necessity for further evidentiary hearings? If so, what modification, if any, should the Commission make with respect to the said Final Report and Order?" (R4-6)

On December 4, 1978 the Commission heard oral arguments on the foregoing issue after which the parties filed written memoranda in support of their respective positions. The Committee of Consumer Services (herein "CCS") filed a petition for refund by which it asked the Commission to order

CPN to refund revenue collected as a result of the revenue increase authorized by the February 18 Order.

On March 24, 1979, the Commission issued an order directing further consolidation of a third related case. At the same time the Commission reopened the record in Case No. 76-023-04 and directed that a further prehearing conference be held on April 23, 1979 (R24-25).

All parties appeared at the Pre-hearing Conferences on April 23, 1979. The Commission issued a Pre-hearing Order on April 25, 1979. As related to this appeal, the Pre-hearing Order stated that the issues before the Commission were: "(a) In what particulars should the findings, conclusions and or order be modified or added to in order to harmonize the findings and order of the Commission's Report and Order issued February 18, 1977, [and] (b) Should CP National be ordered to refund any portion of the revenues collected by it under the Report and Order of February 18, 1977?" (R27-28) The same order framed other issues common to the three cases, each dealing with allocation of transmission expenses for rate-making purposes.

The Commission conducted Evidentiary Hearings on the three consolidated cases from May 3 through May 9. The case was submitted on written memoranda.

On January 11, 1980 the Commission issued a Supplemental Report and Order (herein the "Supplemental Order") deciding the issues on remand. The Supplemental Order identified and reconciled the inconsistencies of the February 18 Order. First

acknowledging that the February 18 Order was "inartfully drawn and was hastily issued under the pressures of a heavy case-load of hearings and paperwork"(R124), the Commission made the following findings and conclusions which explained the rationale of the February 18 order:

> "5. The electric service agreement entered between UP&L and CPN was in fact necessary for a firm supply of energy and for construction of new transmission facilities required for service to CPN's customers. That agreement was in the public interest. Expenses for construction of the new transmission line were necessary and reasonable expenses for continued electric service to CPN's Cedar City District customers. At the time the new line was energized, the existing transmission facilities were already overloaded and inadequate to provide necessary transmission. Continued service required new transmission capacity. However, the new transmission line was used to provide electric service not only to CPN's retail electric customers but also for wheeling of energy for the Bureau of Reclamation under the Wheeling Agreement referred to in the Commission's Findings. The Commission allowed CPN to cover only 53.03 percent of the transmission line expense because that was the ratio of use as between the utilities' electric customers and the wheeling of energy for the Bureau. The Commission made precisely the same allocation of expenses in the next succeeding general rate case, Case No. 77-023-08, and neither the Committee of Consumer Services nor any protestant or other party appealed that decision. The increase granted by the February 18, 1977 Order was fully justified, and the rates fixed by that Order were just and reasonable rates." (R124-125)

The Supplemental Order then directed amendment of the February 18 Order to the extent inconsistent with the above quoted findings. The order amended and supplemented the findings of the February 18 Order, accordingly, and then provided:

> "IT IS FURTHER ORDERED, That in all respects not inconsistent with this Supplemental Report and

Order, the February 18 Order is and shall remain in full force and effect and particularly that the rates fixed by the ordering provisions thereof are and were just and reasonable rates for the effective period of the Order.

"IT IS FURTHER ORDERED, That the petition for refund filed on behalf of the Committee of Consumer Services is denied." (125-126)

CCS appeals contending that the Commission should have ordered a refund for the effective period of the February 18 order.

STATEMENT OF POINTS RELIED ON

POINT I

THE PUBLIC SERVICE COMMISSION HAS DETERMINED THAT THE RATES IN EFFECT DURING THE TIME PERIOD IN DISPUTE WERE JUST AND REASONABLE RATES. THE COMMISSION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT IS NOT THE PREROGATIVE OF THE COURT TO ORDER A CUSTOMER REFUND

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ARGUMENT

POINT I

THE PUBLIC SERVICE COMMISSION HAS DETERMINED THAT THE RATES IN EFFECT DURING THE TIME PERIOD IN DISPUTE WERE JUST AND REASONABLE RATES. THE COMMISSION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT IS NOT THE PREROGATIVE OF THE COURT TO ORDER A CUSTOMER REFUND.

The Commission's first order became effective February 18, 1977. Rates fixed by that order were superceded by an order in a subsequent rate case which became effective May 23, 1978. The record in the first case consisted of hundreds of pages of testimony dealing with the issue of allocation of transmission expenses for rate-making purposes. On remand the Commission re-opened the hearings and took additional testimony in May 1979. Testimony offered during the course of this hearing consumed more than 500 pages of testimony (see Transcript beginning at R102). After hearing all of the evidence the Public Service Commission made the following findings:

> "The increase granted by the February 18 Order was fully justified, and the rates fixed by that order were just and reasonable rates." (R125)

Based upon this and other findings the order from which this appeal is taken provided:

> "It is further ordered that the petition for refund filed on behalf of the Committee of Consumer Services is denied." (R126)

Appellants have failed to state in their brief any basis in fact for a finding that the rates placed in effect by the February 18 Order were not just and reasonable rates. Appellants make no argument that the Commission's finding is not supported by the

evidence.

The sole remedy sought by Appellants on this appeal is an order directing the Commission to order a customer refund for the effective period of the Commission's February 18 Order. It has long been recognized in this state that the rate-making function is a legislative function over which the Commission has exclusive jurisdiction. In a very recent decision the Utah Supreme Court considered the very issue which is presented by the Appellants in this case. In Utah Department of Business Regulation vs. Public Service Commission, Case No. 16241, opinion filed June 19, 1980, the majority opinion of the Court made it clear that it is not the prerogative of the courts to direct the Public Service Commission to order customer refunds. In that case the Appellant contended that the court should order all amounts collected under a certain rate order refunded to the consumers. Although reversing the order which established the rate, the court declined to order refunds and made it clear that it is the sole prerogative of the Commission to determine just and reasonable rates. The following quotation from the court's opinion shows the rationale for this conclusion:

> "The division further urges this Court to declare the order of the P.S.C. invalid and void from its inception, and to order the amounts collected thereunder to be refunded. To undertake such a course would be tantamount to this Court engaging in rate-making, which is strictly a legislative power, for the P.S.C. in fixing and promulgating rates acts merely as an arm of the legislature. The review by this Court of the orders of the P.S.C. is confined to the legal issues of whether there is substantial evidence to sustain the findings of the P.S.C.; whether the P.S.C. has

exercised its authority according to law; and whether any constitutional rights of the complaining party have been invaded or disregarded. Any interference by this Court beyond the aforementioned limits would constitute an interference with the law making power of this state." (Pages 11-12) [Emphasis added]

In this case the Commission after extensive hearings has determined that the rates in effect were just and reasonable rates and there has been no challenge to these findings on this record. The court is without power to order refunds.

POINT II

WHEN A COMMISSION ORDER IS REVERSED AND REMANDED BY THE SUPREME COURT THE COMMISSION MAY ADD TO, MODIFY OR COMPLETE THE FINDINGS AND/OR ORDER.

The Supreme Court's remand directed the Commission as follows:

> "As we are unable to correlate the findings with the Commission's Order we reverse and remand the case to the Commission to take such action, including further hearings, if necessary, as it deems advisable for the purpose of achieving a harmonious relationship between its findings and order." Parowan Pumpers Association v. Public Service Commission 586 P.2d 407, 409.

The Court's remand anticipated amendment of the findings and/or order to achieve "a harmonious relationship" between the two. The Rules of Civil Procedures (adopted by the Commission as part of its Rules of Practice) expressly contemplate the possibility of modification or addition to the findings on remand.

Rule 76, Utah Rules of Civil Procedures, provides:

> "The Supreme Court may reverse, affirm, or modify any order or judgment appealed from, and may, in case the findings in any case are incomplete in any respect, order the Court from which the appeal

was taken to add to, modify or complete the findings so as to make the same conform to issues presented in the facts as the same may be found to be the trial court from the evidence, and may direct the trial court enter judgment in accordance with the findings when corrected as aforesaid, or may direct a new trial in any case or further proceedings to be had." [emphasis added] (Commission's Rules of Practice and Procedures, Rule 21.6)

The final sentence of the decision of the Supreme Court obviously intended to direct the Commission to make such change in the findings and/or order as would be necessary to achieve the "harmonious" relationship between the two. In doing so, the Court anticipated that the Commission could add to, modify or complete the findings and/or the order. The court did not direct that the order of the Commission be vacated. Cases decided under Rules 76A, URCP demonstrate a number of the options available to the Court on the first appeal. The Court could have affirmed the Commission's findings and order. Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811 (1972); Doe vs. Doe 48 Utah 200, 158 P.781. It could have reversed and remanded without provisions for further hearings. Openshaw v. Young 107 Utah 399, 152 P.2d 84 (1944); Dunn vs. Wallingford, 47 Utah 491, 155 P.347. It could have reversed and remanded with specific directions. In particular, it could have required the Commission to conform the order to its findings. See, Utah State Road Commission vs. Steele Ranch, 533 P.2d 888 (Utah 1975); Hargrave vs. Leigh 73 Utah 178, 273 P.298. It could have reversed and ordered a new hearing. Taylor v. Sorenson 30 Utah

2d 275, 516 P.2d 1394 (1973); Greenhalgh vs. United Tintic Mines Company, 42 Utah 524, 132 P.390. Finally, the Supreme Court could have reversed and remanded with specific instructions to the Commission that it was to vacate either its findings and/or order and make findings of fact on all issues tendered by the petitioners. Barnes v. Kesler & Sons Const. Co., 549 P.2d 411; Utah Association of Creditmen vs. Homefire Insurance Company, 36 Utah 20, 102 P.631.

The Court in the Parowan Pumpers decision directed the Commission to harmonize the findings and order. This could be accomplished by amendment of either the findings or the order. The Commission's Supplemental Report and Order shows the Commission's rationale for the February 18 Order and reaffirms that rationale based on further evidence. It acknowledges the undisputed fact that new transmission was essential to continued service and explains why a portion of the expense for new transmission was disallowed. Conversely the order shows the factual basis for allowing recovery of a portion of the expense and the rationale for the allocation of the expense. Its findings with respect to the necessity for new transmission is not only consistent with but required by the evidence offered at the first hearing, which was unchanged by the later hearings. If anything, the formula for allocating the recovery of the expense disfavored the utility.

The evidence before the Commission indicated that the utility had incurred an annual expense in excess of $800,000 for

the construction of a new transmission line which was essential to continued electric service to its customers. The new line was energized in August of 1976 and the utility commenced to incur and actually paid monthly expenses for the new line from and after that date. The Commission's order was not issued until approximately 6 1/2 months later, February 18, 1977. During this period of time the company received no reimbursement whatever for the expense. The Commission's order of February 18 allowed only 53.03% of the expense. From August 1976 to the present time the company had paid the entire transmission line expense to Utah Power & Light but has been able to recover only 53% of that expense from and after February 18, 1977. During the effective period of the order (February 18, 1977 to May 23, 1978), the company's overall rate of return on its investment was in the range of 4%.

The Findings of the February 18 Order as supplemented by those of the Supplemental Order are in complete harmony with the ordering provisions of the February 18 Order and these Findings are supported by substantial evidence.

POINT III

WHEN A RATE IS FIXED BY THE COMMISSION AND HAS NOT BEEN SUSPENDED DURING THE PENDENCY OF AN APPEAL NO REFUND CAN BE OBTAINED FROM THE UTILITY COMPANY

The rates approved by the Report and Order in this case became effective when the Commission entered an order on February 18, 1977. Although there is a statutory provision for suspension

of rates pending an appeal (Section 54-7-17, UCA 1953), no suspension order was sought or entered. The rates thereafter charged by CPN were in accordance with the Commission's Order. CPN was required to charge those rates as long as the order of the Commission remained in effect.

The general rule of law is that where a rate fixed by the Commission has not been suspended during the pendency of an appeal and the Commission's Order is ultimately vacated or set aside as unreasonable no refund can be obtained from the utility. Thus, even if the February 18 Order had been vacated, no refund may be allowed.

In Keco Industries, Inc. v. The Cincinnati & Suburban Bell Tel. Co. (Ohio), 141 N.E.2d 465, telephone subscribers sought a refund for the difference between the original rate and an increased rate under a Public Utilities Commission Order which was subsequently held unreasonable and unlawful. In denying the right to recover a refund the Supreme Court of Ohio said:

(141 N.E.2d 465, 568-469)

> "In the present case we have rates which were established by the properly designated authority after a hearing and consideration in full compliance with the law, and until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the only ones which could be collected by the utility.
>
> . . . .
>
> "From the above consideration it is our conclusion that the rates of a public utility on Ohio are subject to a general statutory plan of regulation

and collection; that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court; and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common-law remedy of restitution in such cases."

In Mandel Brothers, Inc. vs. Chicago Tunnel Terminal Co. (Illinois), 117 N.E. 2d 774, the Illinois Supreme Court denied refunds in a similar case holding:

(117 N.E. 2d 774, 775)

"The fundamental issue in this case is whether a rate which has been approved by the Commerce Commission after a hearing as to its reasonableness can be termed an 'excessive' rate for the purpose of awarding reparations. We hold that it cannot, even though the rate approved by the commission has subsequently been set aside upon judicial review.

"* * * 'Where the charges collected by the carrier were based upon rates which had theretofore been established or approved by the public authority, the fact that such rates are subsequently reduced afford no right of action for damages or for the recovery of the difference between the old and new rates upon the ground that the prior rate was unreasonable, unless such right is conferred by the governing statute, as is held to be the case in some jurisdictions.'"

In Foshee vs. General Telephone Co. of the Southeast (Alabama), 322 So.2d 715, the Alabama Supreme Court in denying the right to refund held:

(322 So.2d 715, 717)

"Code of Ala., Tit 48, §§104, 144, establishes That there can be but one lawful rate. Moreover under these statutes a regulated public utility can charge only the rate established by the APSC. Until the APSC on remand modified their rate schedule pursuant to order of the circuit court, General Telephone could charge and collect no other rate except that established by the APSC in its order of

30 October 1972. Hence it is clear that General Telephone is under no legal or equitable obligation to refund any money to their subscribers since it did only what it was required to do by statute."

See also State vs. Alabama Public Service Commission (Alabama) 307 So.2d 521, where the Court holds that no refund can be made unless the rate is suspended and explains the rationale for the rule.

A similar situation was presented in Straube vs. Bowling Green Gas Co. (Missouri), 227 S.W.2d 666, where customers of a gas company sought to recover a refund which had been made to the gas company by its gas supplier. The gas rates of the utility were reduced in consequence of a reduction in purchased gas expense but the customers sought recovery from the utility for a prior period covered by the gas expense refund. In denying recovery, the Missouri Supreme Court said:

(227 S.W.2d 666, 671)

"When the established rate of a utility has been followed, the amount so collected becomes the property of the utility of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the State and Federal Constitutions."

The general rule is summarized in 9 Am Jur 542, § 175:

"Where the charges collected by the carrier were based upon rates which had theretofore been established or approved by the public authority, the fact that such rates are subsequently reduced afford no right of action for damages or for the recovery of the difference between the old and new rates upon the ground that the prior rate was unreasonable, unless such right is conferred by the governing statute, as is held to be the case in some jurisdictions."

The Utah statutes are substantially the same as those construed in the cases above-cited. Under Section 54-7-17, U.C.A., 1953, the pendency of the appeal does not stay the order, but any party may apply to the Court for a suspension Order suspending the rates under the Commission's Report and Order during the pendency of the appeal. This was not done.

POINT IV

SECTION 54-7-17 UCA 1953 DOES NOT REQUIRE OR PERMIT A REFUND IN THIS CASE.

Appellant argues that 54-7-17 (4) provides a mechanism for an automatic refund. From this discordant premise Appellant seeks to have the Supreme Court reverse the Commission and order a refund. This interpretation misreads section 54-7-17. This section of the code is divided into four subsections.

54-7-17(1) reads:

> "The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ the Supreme Court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision."

The first subsection establishes the option for the Supreme Court to stay or suspend an order of the Commission pending an appeal.

54-7-17(2) reads:

> "No order so staying or suspending an order or decision of the commission shall be made by the Supreme Court otherwise than upon three days' notice and after hearing, and if the order or decision of the commission is suspended, the order suspending the same shall contain a specific finding, based upon evidence

submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage."

The second subsection establishes the requirement of a hearing with advance written notice to the parties to be held before any stay or suspension can be granted.

The third subsection, §54-7-17(3), specifies that in the event a stay or suspension is granted a suspending bond must be posted and in certain circumstances the utility is required to deposit revenues with the court to insure the availability of refund monies if the order on appeal is reversed.

54-7-17(4) provides:

"In case the Supreme Court stays or suspends any order or decision lowering any rate, fare, toll, rental, charge or classification, the commission upon the execution and approval of such suspending bond shall forthwith require the public utility affected, under penalty of the immediate enforcement of the order or decision of the commission pending the review and notwithstanding the suspending order, to keep such accounts, verified by oath, as may in the judgment of the commission suffice to show the amounts being charged or received by such public utility pending the review in excess of the charges allowed by the order or decision of the commission, together with the names and address of the persons to whom overcharges will be refundable, in case the charges made by the public utility pending the review are not sustained by the Supreme Court. The court may from time to time require such party petitioning for a review to give additional security or to increase the said suspending bond whenever in the opinion of the court the same may be necessary to ensure the prompt payment of such damages and such overcharges. Upon the final decision by the Supreme Court all moneys which the public utility may have collected pending the appeal in excess of those authorized by such final decision, together with interest in case the court ordered the deposit of such moneys in a bank or trust company, shall be promptly paid to

> the persons entitled thereto in such manner and through such methods of distribution as may be prescribed by the commission. If any such moneys shall not have been claimed by the persons entitled thereto within one year from the final decision of the Supreme Court, the commission shall cause notice to such persons to be given by publication, once a week for two successive weeks, in a newspaper of general circulation printed and published in the city and county of Salt Lake, and in such other newspaper or newspapers as may be designated by the commission; said notice to state the names of the persons entitled to such moneys and the amount due each person. All moneys not claimed within three months after the publication of such notice shall be paid by the public utility under the direction of the commission into the state treasury for the benefit of the general fund."

The fourth subsection establishes an accounting procedure to insure the proper distribution of a refund after final decision of the Court.

Appellants cite section 54-7-17(4) and argue that this subsection is "directly applicable to this case." Subsection (4) by its own language applies "In case the Supreme Court stays or suspends any order or decision lowering any rates. . ." and provides in such cases that "all monies which the public utility may have collected pending the appeal in excess of those authorized by such final decision. . .shall be [refunded]". It should be noticed that this subsection applies only to cases where the rates are suspended and where the order lowers the preexisting rates. This section supports the position of the Respondents in this case because it requires, as a condition to the refund, that the Commission's order be suspended by the Court. That was not done.

The Appellants rely on The Mountain States Telephone and Telegraph vs. Public Service Commission, 107 Utah 520, 155 P.2d 184. That case is not supportive of Appellant's position because in that case the parties preserved the right to the refund by following the provisions of Section 54-7-17(4). The court issued an order suspending the rates. If applicable to this at all, the opinion in that case supports the Respondents position in this case that no refund is appropriate where the rates remain in effect without suspension or stay.

Appellant relies heavily upon the case of the City of Los Angeles vs. The Public Service Commission (California 497 P.2d 786). That case is easily distinguishable. The California Court had issued a stay directing that all sums collected by the utility pursuant to the rates authorized by the Commission should be subject to refund upon order of the Court should the Commission's decision be annulled or modified. The Commission's decision was set aside and the Court ordered the utility to make refunds.

CCS also relies upon the case of The Mountain States Telephone & Telegraph Co. vs. Public Service Commission (Colorado) 502 P.2d 945. In that case the Colorado Court acknowledged case law supporting the rule that a rate is not subject to refund if it is approved by a regulatory commission and collected without suspension or bond. The Court recognized the validity of the general proposition that when a regulatory commission fixes rates for the future in one proceedings, it cannot, in

a subsequent proceeding, decide that the previously approved rates were unreasonable and thereupon establish lower rates with retroactive effect. In distinguishing these cases the Colorado Supreme Court said:

(502 P.2d 945, 949)

> "This rule is not applicalbe to the facts before us. This Court, on appeal, not the Commission in a subsequent proceeding, decided that a portion of the 1969 Rate Order was in error. This Court, not the Commission, found that benefits resulting from the correction of those errors should be passed on to Mountain Bell customers. [emphasis added]
>
> . . .
>
> "This Court may, on review of a Commission Rate Order, require correction of legal errors contained in the Order and provide that benefits arising from those corrections be passed on to the consumers of the utility." [emphasis added]

The exception carved out by the Colorado Supreme Court applies where the Court (not the Commission) orders refunds "passed on to the consumers of the utility". In each case cited by CCS the Court (not the regulatory commission) has undertaken to order the refund (see City of Los Angeles vs. Public Utility Commission et al., (California), 497 P.2d 785; Mountain States Telephone & Telegraph Co. vs. Public Utility Commission, supra; California Municipal League vs. Public Utility Commission (California), 473 P.2d 960). In each of those cases the Court actually determined that the Commission had erred in its determination of test-year expenses and/or rate base and that the ultimate findings were therefore unsupported by the evidence. In all but the Colorado case the rates had been suspended during the appeal

proceedings. This is not the case with the Supreme Court's decision before this Commission. The Court made no determination with respect to the evidence. The case was remanded solely because of the inconsistency between the Findings and the Order with directions to "harmonize" the two. More important, the Court in this case has not vacated the rate order and has not directed that the utility make refunds to its customers, and there is no argument or evidence that the Commission erred in making any of the findings made by it or that such findings are not supported by substantial evidence.

In summary, neither Section 54-7-17, U.C.A. 1953 nor cases cited by the Appellants are applicable to this case. Numerous decisions from many separate jurisdictions support the rule that refunds may not be required where the rates are fixed by the Commission and remain in effect without suspension during the pendency of the appeal period (see Point III).

POINT V

A REFUND ORDER WOULD BE CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE HEARD BY THE COMMISSION. EVEN IF THE COMMISSION WAS WITHOUT POWER TO MODIFY ITS FINDINGS IT HAS THE POWER IN A PASS THRU CASE TO PLACE A RATE INTO EFFECT FOR A PRIOR PERIOD OF TIME TO ALLOW RECOVERY OF UTILITY EXPENSES.

The Commission did not act in ignorance. There was a rationale for both the original order and the Supplemental Report and Order. Although we do not concur with the rationale which does not allow recovery of all of the transmission line

expense we do understand the Commission's reasoning in allowing only 53.03% of such expense. The allocation of transmission line expense was based upon actual usage of the transmission line as between the jurisdictional rate-payers and the Bureau of Reclamation. The evidence on which the allocation was made is not in dispute. If the allocation was unjust, it favored the customers because it placed the burden for almost 50% of a utility expense upon the shareholders of the utility with no means to recover that expense.

But even if the February 18 Order were vacated there should be no refund of revenues paid during the effective period of that Order. As previously observed, the general rule of law is that where a rate fixed by the Commission has not been suspended during the pendency of an appeal and the Commission's Order is ultimately vacated or set aside as unreasonable, no refunds can be obtained from the utility. (See Point III)

Appellants take the position that the Commission's February 18 Order was a nullity, and that the only lawful rates in effect during the period in question were those in existence prior to the Commission's Order. Appellants' position is based upon the decision of the California Supreme Court in the 1972 case of City of Los Angeles, et al. vs. Public Utility Commission, et al, 102 Cal. Rptr. 313, 497 P.2d 785. In that case the California Supreme Court said that:

> "When the rates set in the decision before us are annulled, the only lawful rates are those which were in existence prior to the instant decision. We

> are satisfied that to permit the commission to fix new rates for the purpose of refunds, as requested by Pacific, would involve retroactive rate making in violation of the principles recognized in Pacific Tel. & Tel. Co., v. Public Util. Comm. supra, 62 Cal.2d 634, 649-656, 44 Cal. Rptr. 1, 401 P.2d 353."

As we have already pointed out, the 1972 Los Angeles case is clearly distinguishable because in that case the rate was suspended during the pendency of the appeal and revenues were collected subject to refund. Furthermore, in the Los Angeles case, unlike the case now before the Court, the reviewing Court actually vacated the Commission's Order. The Utah Supreme Court did not vacate but instead remanded to achieve harmony between the Findings and Order. There is another reason, however, why the Los Angeles case has no application to the case now before the Commission.

The Los Angeles case was a general rate case. In more recent decisions the California Supreme Court has held that the rule stated in that case and in the earlier case of Pacific Telephone and Telegraph Co. v. Public Service Commission, (Californi 1965) 401 P.2d 355, (also cited by Appellant) applies only to general rate cases and has no application to "off-set" or "pass-thru" rate cases which do not involve the general rate making process. In Southern California Edison Company vs. Public Utility Commission, 144 Cal. Rptr. 905. 576 P.2d (1978) the Court permitted retroactive adjustment of rates in a pass-through rate case on the rationale that the cost adjustment did not constitute "rate making". Referring to the Los Angeles and Pacific cases,

the California Court distinguished them as follows:

(576 P.2d 945)

> "We question neither the rule stated in the foregoing decisions nor its application to the facts there presented. But this is not such a case. At the risk of belaboring the obvious, we observe that before there can be retroactive rate-making there must at least be ratemaking. There undoubtedly was ratemaking in both Pacific Te. & Tel. and City of Los Angeles I; as we shall explain, however, rate-making within the meaning of the cited decisions did not occur in the case at bar."

In a footnote to its decision the Court distinguished the Pacific case:

(Footnote 3, 576 P.2d 946)

> "Pacific Tel. & Tel. relied on a number of decisions of federal courts and our sister states which likewise held that rate-fixing orders could operate only prospectively. (62 Cal.2d at pp. 650-652, 44 Cal. Rpts. 1, 401 P.2d 353.) But an examination of each shows that all involved various types of general rate orders and none remotely resembled the situation now before us."

Thus, the most recent decisions of the California Supreme Court have limited the rule prohibiting retroactive rate making to a general rate case and have determined that the rule has no application to the abbreviated "offset" or "pass-thru" proceedings. Indeed the court has approved retroactive adjustment of rates in pass-thru cases. The distinction between the "general" and "pass-thru" cases is described in California Manufacturers Association v. Public Utility Commission, Southern California Gas Company and San Diego Gas and Electric Company, California (1979) 595 P.2d 98. In that case the California Supreme Court said:

> "In a general rate setting proceeding, the Commission determines for a test period the utility's expense, the utility's rate base and the rate of return to be allowed. Using those figures the Commission determines the revenue requirement, and then fixes the rates for the consumers to produce sufficient income to meet the revenue requirements... The rates are fixed in the general proceedings on the basis of historical data. Adjustments may be made in that proceeding for anticipated future extraordinary changes. ...It is obvious, revenues, expense, and rate base arrived at on historical data will not remain constant in future years when the rates take effect. The assumption underlying fixing of future rates on historical data is that for future years changes in the revenues, expense and rate base will vary proportionately so that the utility will receive a fair rate of return. 595 P.2d 98, 100.
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> "When an item of either expense or revenue tends to vary abnormally in comparison to the utility's other financial criteria, adjustment of rates charged have been permitted in abbreviated proceedings. ... Such proceedings--termed off-set proceedings by the parties--have been used in the past to make rate adjustments necessitated by increases in fuel costs disproportionate to the variations in other costs." 595 P.2d 98, 101.

The California Manufacturers case involved an offset or pass-thru type proceedings to recover increased fuel costs. In holding that rule against retroactive rate making has no effect in such a case, the Court said:

> "The utilities' briefs were filed prior to the recent decision in Southern California Edison Co. vs. Public Utility Commission, supra, 20 Cal. 3d 813. In that case the Court held that rate changes based on increased fuel costs do not involve rate making and that therefore the rule against retroactive rate making was not applicable..." 595 P.2d 98, 103.

The case now before the court is an "offset" or "pass-thru" type proceeding for recovery of extraordinary expense. It is not a general rate making proceeding. Therefore, under the

California Rule, the Commission had jurisdiction in this case to make a new determination with respect to that portion of the transmission line expense which should be allowed and to give that determination retroactive effect. In other words even if the February 18 Order were technically a nullity as claimed by Appellants (an argument Respondent does not concede), the Commission under the California Rule (and even if the rate had been suspended in this case) could have subsequently determined that allowance of 53.03% of the expense or any other portion thereof was reasonable and could have then given such determination retroactive effect. The evidence offered during the several days of hearings on remand fully support such a result and Appellants make no argument that the Commission's order is not supported by substantial evidence. The findings in the Supplemental Order expressly determine just and reasonable rates for the effective period of the February 18 Order. It is noteworthy that the same issue of transmission line expense was treated by the Commission in the general rate case which followed 76-023-04. In 77-023-08 the Commission made the same ruling allowing 53.03% of the Utah Power & Light transmission expense. No appeal was taken from that case. (See R124-125)

There is an additional flaw in the legalistic argument urged by the Appellants. Counsel for the Appellants argued before the Commission that if the February 18 order was a nullity, the only lawful rate was that rate in effect prior to the filing

of the case. This is not true because the next preceding rate Order was a Tentative Order issued September 29, 1976 in Case No. 76-023-04 and pursuant to that Order Tariffs were filed and became effective September 30, 1976. That Order allowed recovery of more revenue than the Final Order issued February 18, 1977. No appeal was taken from the Tentative Order. Further, even assuming, arguendo, that the Tentative Order was rendered ineffectual by a succeeding order which is a "nullity", Appellants have an additional obstacle in their argument that rates preceding the filing of the case should have prevailed. Under the provisions of Section 54-7-12, U.C.A., 1953, a rate filed by a utility becomes final at the expiration of 120 days. The rates in 76-023-04 were filed June 30, 1976. If the Commission's Order of February 18, 1977 was a nullity, as claimed by the Appellants, and the Order of September 29, 1976 had no legal effect, then the rates filed by CPN in Case No. 76-023-04 became final by virtue of the expiration of the suspension period and the utility is entitled to recover the full amount of such rates which includes all of the expense disallowed in the February 18 Order.

CONCLUSION

The Commission has determined just and reasonable rates for the period in dispute and that determination is supported by substantial evidence. The Commission has power to modify and add to its Findings on remand. The modifications made by

it are supported by reason and by the evidence and result in complete harmony between the Findings and the Order. No refund is required or should be permitted in this case. The Supplemental Report and Order should be affirmed.

Respectfully submitted,

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